Supreme Court, U.S.
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No. 03-1474

In The
Supreme Court of the United States

STEPHEN P. SIMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner received a fair and impartial trial as a result of the Trial Court abusing its discretion in denying his Motion in Limine to preclude extrinsic acts from the trial, and whether such error was harmless. (Whether the Petitioner was actually convicted of uncharged conduct, rather than the indicted charge.)

2. Whether the evidence presented to the trier of fact, considered in a light most favorable to the Government, was sufficient to support a conviction.

LIST OF PARTIES

The parties to this proceeding are Petitioner, Stephen P. Simon, and Respondent, United States of America, through the office of the Attorney for the United States for the Middle District of Louisiana, through Robert Piedrahita, Assistant United States Attorney.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Stephen P. Simon, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, filed on February 10, 2004.

OPINION BELOW

The Fifth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. The decision is reported at 87 Fed. Appx. 355 (2004). The ruling on the Motion in Limine by the District Court is included here as Appendix B.

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals filed its decision of February 10, 2004 (Appendix A). This Court has jurisdiction under 28 U.S.C. §1254(1), and U.S. Sup. Ct. Rule 13.1 and 13.3.

Per U.S. Sup. Ct. Rule 10(a) and (c), this Court should grant *Certiorari* because the United States Court of Appeals for the Fifth Circuit has decided an important federal question in a way that conflicts with a relevant decision of this Court. Also, because the Fifth Circuit Court of Appeals, a Federal Court of last resort, decided an important federal question which appears to be a decision in conflict with other federal courts regarding the issue.

RELEVANT PROVISIONS INVOLVED

U.S. Const. amend. V states in *Pari Materia:*

> " . . . nor be deprived of life, liberty, or property, without due process of law . . . "

Federal Rule of Evidence Rule 404(b), 28 U.S.C.A., states:

> "Evidence of other crimes, wrongs, or acts, is not admissible to prove the character of a person in order to show action and conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . "

Federal Rule of Evidence Rule 403, 28 U.S.C.A., states:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, a waste of time, or needless presentation of cumulative evidence."

STATEMENT OF THE CASE

On January 30, 2002, Louisiana law enforcement officials executed a search warrant at the home of Petitioner and his wife, in conjunction with a burglary investigation. The detectives found a .25 caliber pistol in a drawer of a nightstand, on the wife's side of the bed, in the Simon's bedroom. Detectives also found other items

located on the property, which were alleged and assigned by them to be burglary accessories. Additionally, authorities found certain property which had been the subject of thefts from several businesses in Louisiana.

The detectives, who had Simon in custody outside of the residence, asked Simon for the combination to the gun lock found in the house. Though the testimony at trial was conflicting, Simon provided the combination, believing the lock to be on his young son's BB rifle, for which the same had been purchased some time earlier. In fact, the lock was on the pistol located in the bedroom. Petitioner's wife claimed the pistol belonged to her and was not known to exist by Petitioner, as he had been living in Houston, Texas, for several months, coming home only occasionally for a weekend visit. She had received the gun from her mother for security in respect of Petitioner's absence. Petitioner, at trial, claimed he had no knowledge of the pistol possessed by the wife.

Petitioner was indicted on a charge of Possession of a Firearm by a Felon in violation of 18 U.S.C. §922(g)(1). Prior to trial, Petitioner filed a Motion in Limine seeking to prohibit the Government from eliciting any testimony or referring to any item, other than the .25 caliber pistol, seized from his residence during the execution of the search warrant, as such constituted extrinsic, bad, acts evidence, prohibited under Rule 404(b) of the Rules of Evidence. And, even if relevant, under Rule 403 of the Rules of Evidence, as any relevancy would be outweighed by its prejudicial effect. Respondent also sought to prohibit the Government from referring to any alleged criminal acts he committed, other than the three burglaries for which he had previously been convicted.

The Government asserted the extrinsic evidence was necessary to its case-in-chief, to show "knowledge" and "intent" of the defendant pertaining to the charge of Felon in Possession of Firearm. In that regard, prior to trial, the Trial Court made a written ruling (Appendix B), on the Motion in Limine, denying the same. At trial, the Government presented to the jury and submitted into evidence the matters objected to by defendant in his Motion in Limine. The detectives testifying at the trial stated, it was their opinion, the equipment found in Petitioner's house could be useful in burglaries. However, the Government did enter into a stipulation with the Petitioner that no latent fingerprints of him were found upon the firearm in question, nor its holster, nor bullets, and that the ammunition seized from the house was lost by authorities some time subsequent to the search. Petitioner also stipulated he had been convicted of a crime punishable by imprisonment for a term exceeding one (1) year (a felony), and he was prohibited by law from possessing a pistol or handgun.

Petitioner testified he had been living in Houston, Texas, for about seven (7) months, and had returned to Louisiana only a few hours before the police arrived to search his home. He claimed, as well as his wife, the gun lock had been purchased for his son's BB gun, and that he did not know his wife had a pistol in the house. Petitioner's wife, Melissa, and his mother-in-law, Mary Duhon, testified Duhon had given Melissa the .25 caliber pistol for safety while he was away in Houston. Melissa testified she had transferred the gun lock from the BB gun to the .25 caliber pistol after she came into possession of it, for security sake with children in the home. Petitioner claimed, as set forth earlier, when detectives asked him for the combination to the gun lock, he thought the lock was still attached to the BB gun, for which it had

been purchased. Respondent did admit he had been convicted of at least three (3) burglaries.

Petitioner was found guilty by jury verdict on the one (1) count Indictment. He moved for Judgment of Acquittal after the Government's case-in-chief, and renewed after the Government's rebuttal. The Court denied both motions. Petitioner's Motion for New Trial was also denied.

On appeal, the Fifth Circuit Court of Appeals ordered and adjudged the judgment of the District Court affirmed, but remanded the case for resentencing, as the sentence was imposed in a manner in conflict with Rule 32(i)(1)(A) of the Federal Rules of Criminal Procedure. [Resentencing has yet to occur in this matter. Petitioner was sentenced to a term of 210 months.] Thus, it is from the Fifth Circuit's affirming the Trial Court's decisions, regarding the two (2) issues earlier set out, this Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. The Petitioner was deprived of liberty without due process of law by the District Court, and the U.S. Court of Appeals for the Fifth Circuit, incorrectly construing Rule 404(b) and Rule 403 of the Federal Rules of Evidence, by denying Petitioner's Motion in Limine to exclude extrinsic (bad act) evidence by the former, and not finding such decision an abuse of discretion and not harmless by the latter

Discussion.

Of essence to this writ, is:

a. did the trial court commit error through the admission of 404(b) extrinsic act evidence; and,

b. if so, was such error harmless.

In this matter, the Government was required to prove, as to the indicted charge, the following:

1. that the defendant previously had been convicted of a felony;

2. that the defendant possessed a firearm; and,

3. that the firearm traveled in or affected interstate commerce.

18 U.S.C. §922(g)(1); *U.S. v. Washington,* 340 F.3d 222 (5th Cir. 2003); *U.S. v. Gresham,* 118 F.3d 258 (5th Cir. 1997).

At trial, the Government introduced extrinsic act evidence of several uncharged burglaries from different locations in Louisiana. The Petitioner was not accused of being the perpetrator of such criminal offenses. The Government's purpose in doing so was clear, to bootstrap an otherwise extremely weak case of Felon in Possession of a Firearm by tending to suggest the Petitioner was a person of bad character. In doing so, the jury was inclined to feel the Petitioner should be punished for the extrinsic activity even if he was not guilty of the offense charged. Thus, Rule 404(b), and Rule 403, of the Federal Rules of Criminal Procedure, had the Court properly decided the Motion in Limine issue, would have excluded the same as such was relevant solely to the issue of Petitioner's character.

Specifically, the Court erred in resolving its "heightened" abuse of discretion standard in this instance by permitting the extrinsic acts. *U.S. v. Jackson,* 339 F.3d 349 (5th Cir. 2003). This is because evidence in criminal trials must be strictly relevant to the particular offense charged. *U.S. v. Hayes,* 872 F.2d 582, 587 (5th Cir. 1989). The

Court, in ruling on the Motion in Limine, incorrectly applied the *Beechum* test, a well-established precedent in the Fifth Circuit. *U.S. v. Beechum,* 582 F.2d 898 (5th Cir. 1978), *cert. den.*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). *Beechum* established a two-step process for admissibility for extrinsic evidence under Rule 404(b). First, it must be determined extrinsic evidence is relevant to an issue other than the Petitioner's character. Id at 911. Second, the *Beechum* test requires the evidence must possess probative value not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403 of the Federal Rules of Evidence. *Beechum,* 582 F.2d at 911.

The Government argued it needed the extrinsic act evidence, admitted at trial, to prove intent motive by Petitioner to knowingly possess a firearm. (See App. B, p. App. 14.) The Court agreed, in its decision (See App. B, p. App. 15) with the Government's position and permitted extrinsic act evidence to be admitted. However, in doing so, the District Court overlooked the alleged extrinsic acts and the indicted offense did not require the same state of mind for relevancy purposes. *U.S. v. Jackson,* 339 F.3d 349 at 354, 359 (5th Cir. 2003); *U.S. v. Gordon,* 780 F.2d 1165 (5th Cir. 1986). Such is because a Felon in Possession of a Firearm is a **general intent crime**, whereas the admitted extrinsic act evidence required **specific intent**, resulting in a substantially different state of mind. *U.S. v. Berrios-Centeno,* 250 F.3d 294 (5th Cir. 2001); *U.S. v. Myers,* 104 F.3d 76 (5th Cir. 1997).

Thus, in the question of intent and the admission of extrinsic act evidence to prove the same, the offense charge and the 404(b) acts must be similar, as such is a standard by which relevancy is measured under Rule 404(b). *U.S. v.*

Gordon, 780 F.2d at 1173. In the context a claim that extrinsic evidence is relevant to the issue of intent/motive, as was presented by the Government in this matter, relevancy is determined by comparing the state of mind of the defendant in perpetrating the respective offenses. *U.S. v. Gordon,* 780 F.2d at 1173. As the extrinsic act evidence, alleged burglaries, required a specific intent state of mind, as compared to only general intent for Felon in Possession of a Firearm, the Rule 404(b) matters should have been excluded. *U.S. v. Gordon,*780 F.2d at 1173-1174. The general intent nature of the Felon in Possession is apparent from 18 U.S.C. §922(g)(1), as the language of that statute contains nothing suggesting a specific intent requirement. It only defines a general intent offense. Therefore, in accordance with the jurisprudence of the Fifth Circuit, the District Court and the Appellate Court incorrectly presumed the charged statutory crime required specific intent in the absence of language or jurisprudence to that effect. *U.S. v. Myers,* 104 F.3d 76, 81 (5th Cir. 1997). Such is important here, as the Government attempted, in justifying its admission into evidence, that Rule 404(b) extrinsic act evidence, pertaining to the uncharged, unprosecuted and unsolved burglaries in Louisiana, was required to prove motive/intent.

In this regard, of the seven (7) Government witnesses called in its case-in-chief, of a total of ten (10), such testified primarily to 404(b) extrinsic act evidence seized from the defendant's home at the time the subject weapon was found, and five (5) of them solely regarding such matters. Thus, the error in the trial of this matter is not that unlike *U.S. v. Ridlehuber,* 11 F.3d 516 (5th Cir. 1993). In *Ridlehuber*, the Government's effort in its case-in-chief was to buttress its theory the weapon was on the premises in conjunction with uncharged, convictionless and unsolved

burglaries addressed by the extrinsic act witnesses. In *Ridlehuber*, as in the case at hand, the Government's case had a dual focus: a weapon and burglaries. In *Ridlehuber*, the duel focus was on guns and drugs. However, in that case, the purported extrinsic act evidence supposedly proved an intent and motive for defendant's possession of a weapon. The *Ridlehuber* court held, though, motive is not an element of the crime for which the defendant was convicted. Neither is motive an element in the present matter. However, the *Ridlehuber* case noted the Government can prove motive even when it does not have to do so, to provide an explanation for why a gun was in the house. However, as in *Ridlehuber*, the supposed proof of defendant's motive for possessing the gun took center stage at trial. The *Ridlehuber* court stated, " . . . the gun itself, like a corpse that opens a detective story, served more as a prop around which the Government's theory of the case revolved." *Ridlehuber,* 11 F.3d at 519.

In *Ridlehuber*, of the seven (7) witnesses in the Government's case-in-chief, five (5) gave testimony in support of the Government's theory the defendant possessed the weapon to protect a clandestine drug lab. As with *Ridlehuber*, the Government's efforts in the case-in-chief at hand, was to buttress its theory the weapon was on the premises in conjunction with uncharged, convictionless and unsolved burglaries addressed by the extrinsic act witnesses. The current matter is an ideal example of the primary danger inherent in the admission of other acts evidence, in that the jury will very likely convict a defendant not for the offense charged, but for the extrinsic acts. *Beechum,* 582 F.2d at 914. Such danger is particularly great where, as in this matter, the extrinsic activity is not the subject of a conviction. In such an instance, the danger centers on the

jury feeling the defendant should be punished for that activity even if he is not guilty of the offense charged. To guard against such, Rule 404(b) was designed to exclude extrinsic evidence when it is relevant solely to the issue of defendant's character, as developed in this case by the Government.

Thus, the Trial Court, and the Court of Appeals, erred in applying the *Beechum* requirements, that the extrinsic act evidence is relevant to an issue other than the defendant's character. *Beechum,* 582 F.2d at 911. To make that determination, the Court also erred in determining the Government had offered sufficient proof demonstrating the defendant committed the alleged extrinsic offenses or acts. *Beechum,* 582 F.2d at 913. When the purported proof offered by the Government is insufficient, as it was in this matter as the trial record reflects, the trial judge must exclude the evidence because it is irrelevant. *Beechum,* 582 F.2d at 913.

Here, as in *Ridlehuber*, the Government did not prove, in accordance with Federal Rules of Evidence 404(b), the existence of what was presented as property of subject of a burglary involved an illegal act by the defendant. Rather, it insisted the mere existence of such items in the defendant's home was indicative of an illegal act. However, the question which must be decided is whether the Government put forth sufficient evidence to connect the existence of the items in the defendant's home, and that he possessed them as a result of some illegal act on his part, not that of others. Such was not done.

Further, under the *Beechum* test, even if the Government sustained its initial burden of the extrinsic act matters being relevant to an issue other than the defendant's character, Rule 403 of the Federal Rules of Evidence

requires searching of the question of whether the probative value of such outweighs the danger of unfair prejudice. Here, the extrinsic acts offered were not the subject of a conviction. Nor did the Government sustain the second portion of the *Beechum* rule, because the probative value must be determined with regard to the extent to which the defendant's unlawful intent is established by other evidence. To have met this second test, there must have been some overall similarity of the extrinsic acts offered and the charged offense. *Beechum,* 582 F.2d at 914-915. This, simply, did not occur at trial.

Primarily, the Government failed to sustain the *Beechum* test, especially as to its desire to show motive/intent, as the offense charged and the extrinsic acts did not require the same state of mind. The extrinsic acts in this regard, require the same intent as the charged offense, in order to satisfy *Beechum* for admission. *U.S. v. Jackson,* 339 F.3d 349 at 354, 359 (5th Cir. 2003). As earlier stated in the writ application, the extrinsic acts of burglary require a specific intent to commit a felony and/or deprive another of his property. Felon in Possession of a Firearm is only a general intent statute, as evidenced in 18 U.S.C. §922(g)(1).

And, as in the *Jackson* case, the Petitioner's defense there was the same as the Petitioner's in this matter. Both claimed they had nothing to do with the object of the prosecution, bounty in *Jackson* and weapon here. As in *Jackson,* the Petitioner in this matter did not plead innocent, mistake, ignorance, or accident. Rather, that he had nothing to do with the firearm. Thus, the entire issue of intent/motive was not in question or controversy. Therefore, when intent/motive is not contested, evidence of the defendant's commission of a crime not charged in the

indictment goes more to the inadmissible purpose of proving the defendant is a bad man, than to the admissible purpose of proving intent. *U.S. v. Kirk,* 528 F.2d 1057, 1060-1061 (5th Cir. 1976). Thus, such causes a failure of the second portion of the *Beechum* test. *Beechum* 582 F.2d at 911.

Here, the prejudicial impact of the burglary extrinsic act evidence was magnified by the Government's focus on the same. As the trial record reflects, a significant portion of the total volume of testimony heard by the jury concerned the burglaries, and other items found in the Petitioner's home which were attributed to a sinister nature associated with an uncharged and unproven illegal act. As such, the Trial Court's instruction to the jury about the limited use of extrinsic evidence could not serve to alleviate the unfair prejudice from the admission of the same and a basic denial of Amendment V of the Constitution of the United States. *Ridlehuber,* 11 F.3d at 523-524. The Government simply bootstrapped evidence into its case to bolster an otherwise weak one against the offense charged of Felon in Possession of a Firearm. Thus, the error by the Trial Court in this matter surely influenced the jury in its decision, when the case otherwise was so weak it could not be said beyond a reasonable doubt that the verdict could be attributed otherwise. *Kotteakos v. U.S.,* 328 U.S. 750, 764, 66 S.Ct. 1239, 1247, 90 L.Ed. 1557 (1946); *U.S. v. Joseph,* 333 F.3d 587 (5th Cir. 2003); *U.S. v. Horner,* 225 F.3d 549 (5th Cir. 2000); *U.S. v. Colombo,* 909 F.2d 711 (2nd Cir. 1990); *U.S. v. Ruffin,* 575 F.2d 346, 359 (2nd Cir. 1978); *U.S. v. Corey,* 566 F.2d 429, 432 (2nd Cir. 1977). Additionally, none of the 404(b) acts constituted cumulative testimony, and as the trial record reflects, the case-in-chief, otherwise, did not contain overwhelming evidence of

guilt. The magnitude of the prejudicial impact and lack of harmless error is especially evident when viewed in light of the next reason for granting of the writ, to follow.

II. The Petitioner was deprived of liberty without due process of law by the Trial Court erring in denying Petitioner's Motion for Judgment of Acquittal (Rule 29 of Federal Rules of Criminal Procedure) by finding any reasonable trier of fact could have found the evidence presented at trial established the essential elements of the charged crime beyond a reasonable doubt, and affirmance of the same by the Court of Appeals

Discussion:

The most critical evidence against the Petitioner pertaining to the charged offense, which was circumstantial at best, concerned the fact he provided the combination to a trigger lock found on the firearm of subject. Testimony proved the lock had been purchased by the Petitioner, and placed by him on his son's toy BB gun during one of his visits home while away in Houston, Texas, as a disciplinary measure. And, that the weapon of subject of the charged offense was found in the Petitioner's residence, in the bedroom he shared with his wife, in her dresser drawer on her side of the bed. Other than the foregoing, the Government labored its case through presentation of Rule 404(b) extrinsic act evidence, as set forth earlier. Even the Court, in initially denying the Petitioner's Motion for Acquittal, characterized the case against the Petitioner as "circumstantial". (R.V. 4, pp.130-131). The Court, in crystallizing its ruling on the Motion for Acquittal, centered on the testimony of one officer concerning the gun lock, and the combination provided by the Petitioner.

As set forth earlier, the Petitioner knew the combination to the gun lock, because he had purchased it for his son's BB rifle. He had no knowledge the lock had been transferred to his wife's pistol, nor that the wife even possessed the same.

Thus, discounting the testimony presented by the defense in its presentation to the jury, and looking strictly to that most favorable to the prosecution in its case-in-chief, the question is whether any rational trier of fact could have found the Petitioner guilty beyond a reasonable doubt of the charged offense. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *U.S. v. Washington,* 340 F.3d 222 (5th Cir. 2003). In light of the circumstances surrounding the trigger lock pertaining to the BB gun and the pistol, the failure of any forensic evidence of any nature to establish a connection between the weapon, holster or ammunition and the Petitioner, his absence from the home for an extended period of time for the previous six (6) months, and arriving merely two and one-half (2.5) hours prior to the charged event, casts serious doubt on a result beyond a reasonable doubt. Here, the only direct evidence against the Petitioner as a Felon in Possession of a Firearm, was the finding of the weapon in his primary residence, to which he had not been present on a regular basis for over six (6) months. [The last time he was at his residence, in regard to the events of this matter, was November of 2001, and the offense occurred on January 30, 2002.]

The Government in this matter, as in *Ridlehuber*, argued and presented to the jury the firearm was just a cog in the wheel of a larger criminal enterprise, a burglary world. However, the Government, as in *Ridlehuber*, did not prove, or even suggest the Petitioner was responsible for burglaries, nor the possession by the Petitioner of those items alleged as burglary accessories had been used in any

uncharged criminal activity whatsoever, or the 404(b) burglaries. The Government used its unproven, uncharged burglary theory to dictate what was and what was not extrinsic of the charged offense in this matter. Thus, in considering the evidence in a light most favorable to the prosecution, with all reasonable inferences made in support of the jury's verdict, it is not plausible a reasonable trier of fact, excluding the Rule 404(b) extrinsic act (bad act) evidence, could have found the Petitioner guilty of the essential elements of the crime beyond a reasonable doubt. *U.S. v. Montgomery,* 210 F.3d 446 (5th Cir. 2000).

This case is not one in which the evidence of guilt was overwhelming, as in *U.S. v. Montemayer,* 684 F.2d 1118 (5th Cir. 1982), nor where the Rule 404(b) extrinsic act evidence was merely cumulative of other evidence at trial, as in *Corpus v. Estelle,* 571 F.2d 1378 (5th Cir. 1978). Contrary, in this matter, the case against the Petitioner, at best, was anemic and the Rule 404(b) evidence was not cumulative of any testimony of the case-in-chief against the Petitioner. Truly, a miscarriage of justice has occurred in this matter by a denial of the Constitutional guarantee of due process of law, and the deprivation of liberty without the same.

CONCLUSION

As the Trial Court erred in its admission of Rule 404(b) evidence, and the admission of the same was not harmless under existing jurisprudence in denying the Petitioner's Motion for Acquittal, Petitioner prays for a Writ of Certiorari to issue, reversing the decision of the Fifth Circuit Court of Appeals.

Dated: April 22, 2004

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-30422
SUMMARY CALENDAR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEPHEN P. SIMON,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Louisiana
(02-CR-82-ALL)

(Filed February 10, 2004)

Before REYNALDO G. GARZA, DAVIS, and BARKSDALE, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:[1]

In this appeal, we review the conviction and sentence of Defendant-Appellant, Stephen Simon (hereinafter,

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[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

"Simon"), for possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). For the following reasons, we affirm the conviction, but remand for resentencing.

I.

PROCEDURAL AND FACTUAL BACKGROUND

On January 30, 2002, Louisiana law enforcement officials executed a search warrant at the home of Stephen and Melissa Simon in conjunction with a burglary investigation. The detectives found a .25 caliber pistol in the drawer of the night stand in Simon's bedroom. The detectives also found a lock pick set, a ski mask, a tactical vest used to carry equipment, two falsified FBI identification badges containing Simon's photograph, a Louisiana State Police badge, handcuffs, voice-activated communication devices, wedges, and a rappelling rope. Finally, the detectives found items, including knives, watches, and computer equipment, identified by witnesses as having been stolen from various businesses in Louisiana.

The detectives told Simon, who was in custody outside, that they had found a gun in his bedroom. Simon initially denied knowing anything about the pistol, but later claimed it was his wife's pistol. The pistol had a gun lock attached to it and Simon eventually gave the detectives the correct combination to the gun lock, allowing the detectives to determine that the pistol was loaded.

Simon was indicted on the charge of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). Prior to trial, Simon filed a motion in limine seeking to prohibit the Government from eliciting any testimony or referring to any item, other than the .25 caliber pistol, seized from his residence during the execution of the

search warrant. Simon also sought to prohibit the Government from referring to any crimes he committed, other than three burglaries for which he had previously been convicted. The district court denied Simon's motion in limine.

At trial, detectives testified that the equipment found in Simon's house could be useful in burglaries. They testified that voice-activated radios are used to relay information without pushing buttons; that rappelling ropes are used to climb buildings; that wedges are used to hold open windows and doors; that ski masks are used to conceal identities; that tactical vests are used to carry knives and ropes; and that scanners are used to monitor police communications.

Simon testified that he had been living in Houston, Texas for about seven months and had returned to Louisiana only a few hours before the police arrived to search his home. He claimed that he had purchased the gun lock for his son's BB gun, and that he did not know his wife had a pistol in the house. Simon's wife, Melissa, and Simon's mother-in-law, Mary Duhon, testified that Duhon had given Melissa Simon the .25 caliber pistol for safety while Simon was away. Melissa Simon testified that she had transferred the gun lock from the BB gun to the .25 caliber pistol. Simon claimed that when the detectives asked him for the combination to the gun lock, he thought the lock was still attached to the BB gun. Simon did, however, admit that he possessed the burglary equipment, and that he had been convicted of at least three burglaries.

Simon moved for a judgment of acquittal after the government's case-in-chief and again after the Government's rebuttal. The court denied both motions. The jury

found Simon guilty as charged, and the district court denied Simon's motion for a new trial.

The Presentence Report (hereinafter, "PSR") recommended that Simon be sentenced as an Armed Career Criminal pursuant to 18 U.S.C. § 924(e) based upon his prior burglary convictions, giving him an offense level of 33. At sentencing, Simon's defense counsel orally objected to the Armed Career Criminal enhancement. Simon also informed the court that he had not had a chance to review the PSR with counsel prior to the sentencing hearing.

The district court did not address Simon's assertion that he had not had a chance to review the PSR with counsel, nor did the court specifically overrule the objection to the Armed Career Criminal enhancement. The district court then sentenced Simon to 210 months' imprisonment, a special $100 assessment, and four years' supervised release. Simon filed a timely notice of appeal.

II.

"OTHER ACTS" EVIDENCE

Simon first argues that the district court abused its discretion by allowing the admission of "other acts" evidence pursuant to FED. R. EVID. 404(b). He contends that the Government introduced evidence of the burglary equipment and suspected stolen property found in Simon's home to suggest that Simon was a person of bad character, which merely served to bolster their case against Simon for the indicted charge of Felon in Possession of a Firearm.

We will not disturb the district court's decision to admit extrinsic offense evidence under Rule 404(b)

without a clear showing of abuse of discretion. *United States v. McCarty,* 36 F.3d 1349, 1353 (5th Cir. 1994).

Rule 404(b) states that evidence of other crimes or acts is not admissible to prove the character of a person, but the evidence may be admissible to prove, among other things, knowledge or the absence of mistake. FED. R. EVID. 404(b). The danger inherent in the admission of extrinsic evidence is that the jury will convict the defendant, not for the offense charged, but for the extrinsic evidence. *United States v. Beechum,* 582 F.2d 898, 914 (5th Cir. 1978).

To be admissible, extraneous acts evidence 1) must be relevant to an issue other than the defendant's character, and 2) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *Id.* at 911. The evidence must also meet the similar requirements of Rule 403, which states that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. FED. R. EVID. 403.

The Government must offer sufficient proof demonstrating that Simon committed the alleged extrinsic offense for the evidence to be relevant. *See McCarty,* 35 F.3d at 1353. The district court need not be convinced beyond a reasonable doubt that Simon committed the extrinsic offense, nor must the court require the Government to offer clear and convincing proof. *See Beechum,* 582 F.2d at 913. The court must, however, instruct the jury to disregard the evidence if the court finds that the jury could not reasonably find by a preponderance of the

evidence that the alleged extrinsic act occurred. *See McCarty,* 36 F.3d at 1355.

The Government introduced sufficient evidence at trial to prove that Simon committed the extrinsic acts. Simon admitted that he made the fake FBI badges. He also admitted to possessing the tactical vest, ski mask, lock-pick set, voice-activated radio, and police scanner. Evidence was also offered to prove that stolen property was recovered during the search of Simon's home.

In order to convict Simon under § 922(g)(1), the Government had to prove that Simon 1) had been convicted of a felony; 2) possessed a firearm in or affecting interstate commerce; and 3) knew that he was in possession of the firearm. *United States v. Ferguson,* 211 F.3d 878, 885 n.4 (5th Cir. 2000). The "other acts" evidence introduced by the Government helped prove that Simon knew he possessed the pistol, and that his possession was neither an accident nor a mistake. The evidence was relevant to an issue other than Simon's character. *See Beechum,* 582 F.2d at 911.

As to whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, we take care not to infringe upon the broad discretion of the district court regarding the relevance, probative value, and prejudicial effect of evidence. *McCarty,* 26 F.3d at 1353-54. Because Simon argued that he did not know the pistol was in his home, the "other acts" evidence was critical in proving Simon's knowledge. Further, the district court provided the jury with a limiting instruction to mitigate the prejudicial effect of the evidence. Thus, the district court did not abuse its discretion in admitting the extraneous-acts evidence.

III.

SUFFICIENCY OF THE EVIDENCE

Simon next argues that the evidence supporting his conviction was insufficient. The Government was required to prove that Simon 1) was a convicted felon; 2) possessed a firearm in interstate commerce; and 3) knew that he possessed the firearm. *Ferguson,* 211 F.3d at 885 n.4. Simon concedes that he is a convicted felon and that the pistol was found in his home, thus the only element at issue is whether Simon knew the pistol was in his home.

The standard of review is whether any rational trier of fact could have found the essential elements beyond a reasonable doubt, and the evidence is reviewed in the light most favorable to the prosecution. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

Possession may be either actual or constructive. *United States v. Mergerson,* 4 F.3d 337, 348 (5th Cir. 1993). Constructive possession is defined as ownership, dominion, or control over an object, or dominion or control over the premises in which the object is concealed. *Id.* at 349. In order to establish constructive possession, the evidence must demonstrate a plausible inference that Simon knew of and had access to the pistol. *See United States v. Fields,* 72 F.3d 1200, 1212 (5th Cir. 1996).

Simon provided the detectives with the combination to the gun lock attached to the pistol, giving rise to a plausible inference that he knew the pistol was in his home. The evidence regarding the stolen property and the burglary equipment also support that finding. Thus, the evidence, viewed in the light most favorable to the Government, was sufficient to support Simon's conviction.

IV.

RESENTENCING

The Federal Rules of Criminal Procedure require the sentencing court to verify that the defendant and the defendant's attorney have read and discussed the PSR. FED. R. CRIM. P 32(i)(1)(A). On the day of his sentencing, Simon informed the court that he had not had a chance to review the PSR with his attorney, and that if had adequate time, he would object to portions of the PSR. The rules of criminal procedure also require that the sentencing court rule on any disputed portion of the PSR, or find that a ruling is unnecessary because the matter will not affect sentencing. FED. R. CRIM. P. 32(i)(3)(B). The record is clear, and the Government concedes, that the court failed to comply with these procedural requirements. Because Simon notified the district court that he did not have time to review the PSR with his attorney, this matter must be remanded for resentencing. *United States v. Velasquez,* 748 F.2d 972 (5th Cir. 1984).

V.

CONCLUSION

For the foregoing reasons, we uphold the conviction and remand the matter for resentencing.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 03-30422
Summary Calendar

D.C. Docket No. 02-CR-82-ALL

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

STEPHEN P SIMON

Defendant-Appellant

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge.

Before REYNALDO G. GARZA, DAVIS, and BARKSDALE, Circuit Judges.

JUDGMENT

(Filed February 10, 2004)

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed but remanded for resentencing.

ISSUED AS MANDATE: MAR 3 2004

[Illegible]
[Illegible]

Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ [Illegible]
Deputy

New Orleans, Louisiana

APPENDIX B

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS CRIMINAL NO. 02-82-A

STEPHEN P. SIMON

RULING ON MOTION IN LIMINE

(Filed Nov. 22, 2002)

This matter is before the court upon a Motion in Limine (doc. 13) filed on behalf of defendant, Stephen P. Simon which is a motion to suppress evidence by another name. The motion seeks to preclude the government from offering into evidence or even referring to "any items seized from defendant's residence other than [sic] .25 caliber pistol, manufactured by Armi Tanfoglio Guiseppe, model GP27 . . .".

The defendant is charged under an indictment as follows:

> On or about January 30, 2002, in the Middle District of Louisiana, Stephen P. Simon, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year (a felony), knowingly did possess a firearm, that is, an Armi Tanfoglio Guiseppe, Model GT 27, .25 caliber pistol, bearing serial number M147597, which firearm had previously been transported in interstate and foreign commerce.
>
> The above is in violation of Title 18, United States Code, Section 922(g)(1).

In order for the government to convict the defendant of the crime charged in the indictment, the government must prove each of the following essential elements beyond a reasonable doubt:

1. That the defendant knowingly possessed a firearm, as charged;

2. That before the defendant possessed the firearm, the defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense; and

3. That the possession of the firearm was in or effecting [sic] commerce; that is, that before the defendant possessed the firearm, it had traveled at some time from one state to another.

The defendant has entered a plea of not guilty to the charge contained in the indictment which puts at issue all elements of the alleged crime, as set forth above. Thus the government must prove beyond a reasonable doubt that the defendant not only possessed a firearm but that he *knowingly* possessed that firearm. The word "knowingly" means that the act was done voluntarily and intentionally, not because of mistake or accident.

In its opposition the government claims that in the course of executing a search warrant at a residence occupied by the defendant in Denham Springs, Louisiana, deputies of the Livingston Parish Sheriff's Office discovered computer laptops and assorted computer-related equipment all of which the government claims is stolen property and also discovered:

1. A tactical vest, which included radio holders, a knife holder, and a two-radio setup with headset;

2. A black hood (baclava);

3. Gloves;

4. A lock pick set;

5. Rapelling rope;

6. About 15 Cat pocket knives, which the government claims is stolen property;

7. A Louisiana state police badge;

8. Two FBI Department of Justice commissions bearing the defendant's photograph;

9. The .25 caliber pistol with safety lock that is the weapon charged in the indictment;

10. A scanner frequency book; and

11. Two-way radios.

In addition the government claims that deputies found four metal pipes which were bound together with black tape that resembled a bomb in a storage shed on the property.

The defendant seeks to prohibit the government from offering any evidence pertaining to the items described above except the .25 caliber pistol and also seeks to prohibit the government from offering any evidence relating to prior criminal conduct by the defendant except the three separate convictions of simple burglary which the defendant admits. The defendant argues that any reference to any other criminal activity would be viewed by the jury as "bad acts" for which the defendant is not charged and for which he should not be held accountable in this trial.

The government argues that the evidence sought to be excluded is both relevant and admissible under Rules 404, 403, and 401 of the Federal Rules of Evidence.

Rule 402 provides that, with certain exceptions, "all relevant evidence is admissible . . ." Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The government argues that evidence of tools useful to a burglar as well as articles stolen during burglaries which were found at the defendant's residence, "strongly points to a motive and a plan by the defendant to knowingly possess a firearm."

The defendant relies upon Rule 403 which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The defendant of course insists that such evidence would be "unfair prejudice." The government points out that all evidence offered by the government is intended to be prejudicial to the defendant's case, otherwise it would not be offered. The issue, therefore, is whether the government's presentation of such evidence would be *unfair* prejudice.

The court, of course, at this time knows little or nothing about what evidence might be presented at the trial of the case or what possible positions may be taken by

either side. Consequently, the court must assume that all issues relevant to the indictment are contested, since that is the effect of the defendant's plea of not guilty.

Evidence that the defendant possessed burglar tools and false law officer identification and property stolen in burglaries is certainly relevant evidence tending to show that the defendant knowingly possessed a firearm, that is to say, that his possession was voluntary and intentional, not by mistake or accident.

The court has concern of possible waste of time if the government gets into proving that specific items were indeed stolen in burglaries. The court also has some concern about evidence of the pipes found in the storage shed which may also lead to an undue waste of time and distraction of the jury from the ultimate issues presented to them. Again, the court has no information as to what admissible evidence the government might have that indicates the items are stolen property or how much time might be consumed in presenting that evidence.

All in all, the court knows of no justifiable reason for excluding the evidence, although it is certainly possible, depending upon the positions taken by the parties that such evidence could become cumulative or unnecessary. The government is cautioned to be certain that we do not wind up with a "tail wagging the dog" situation in which we spend excessive time on the evidence of knowing possession.

Subject to conditions at the trial, the motion by defendant in limine (doc. 13) is hereby **DENIED**.

Baton Rouge, Louisiana, November 21, 2002

/s/ John V. Parker
JOHN V. PARKER
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA